78-1879

No.

In the Supreme Court of the United States

October Term, 1979

JERRY GALANTE and SAM MESSINA, d/b/a BUMP CITY,

Petitioners,

vs.

STEEL CITY NATIONAL BANK OF CHICAGO as Trustee under Trust No. 463, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JOSEPH R. CURCIO
180 North LaSalle Street
Chicago, Illinois 60601
(312) 726-0114
Attorney for Petitioners

Of Counsel:
SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion below 1

Jurisdiction 2

Questions presented 2

Constitutional provisions involved 3

Statement 3

Reasons for granting the writ 5

I. The constitutional guarantee of the privilege against self incrimination is absolute and unqualified where timely claimed and the danger of subsequent criminal prosecution is shown 5

A. The privilege extends to witnesses and parties in civil litigation 5

B. The right to remain silent may not be infringed by imposing a penalty for the silence 6

C. A distinction between a plaintiff and defendant in a civil action as to whether or not the Fifth Amendment may be invoked without penalty is artificial and not supported by this court's decisions 10

II. The constitutional privilege against self-incrimination is paramount to the State's statutory right to discovery 12

III. The successful invocation of plaintiffs' right to remain silent is more of a detriment to their case than to defendants' defense, but this is a risk that plaintiff should be permitted to make freely without suffering sanctions of the dismissal of their lawsuit 13

Conclusion 13

PAGE

Appendix A, Opinion of the Appellate Court .....App. 1

Appendix B, Order denying certificate of importance App. 12

Appendix C, Order denying petition for leave to appeal .....App. 13

AUTHORITIES CITED

Cases

Arndstein v. McCarthy, 254 U.S. 71, 4 S. Ct. 26, 65 L. Ed. 138 (1920) 11, 12

Arnst v. Arnst, 49 Wash. 2d 62, 289 P. 2d 483 (1956).... A-8

Bauer v. Stearn Finance Co., 169 N.W. 2d 850 (Ia. 1969) 7

Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923) 6

Bishop v. Bishop, 121 S.E. 305 (Ga. 1924) 7

Brown v. Ames, 346 F. Supp. 141 (1969), Aff'd 416 F. 2d 967 (1972) A-8

Brown v. United States, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) 6, 11, 12

Christensen v. Christensen, 281 Minn. 507, 162 N.W. 2d 194 (1968) 7, A-8

Cohen v. Hurley, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) 8

Department of Transportation v. Zabel, 29 Ill. App. 3d 407, 330 N.E. 2d 878 (1975) A-9

PAGE

Franklin v. Franklin, 365 Mo. 442, 283 S.W. 2d 483 (1955) 7, A-8

Gardner v. Broderick, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1967) 7

Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) 8, 9, 10, 12

Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) 6, 8

Henson v. Citizen's Bank of Irving, 549 S.W. 2d 446 (Tex. 1977) 7

In Re: Holland, 377 Ill. 346, 36 N.E. 2d 543 (1941) A-10

Independent Productions Corp. v. Loew's Inc., 22 FRD 266 (1958) A-8, A-9

Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (1968) Aff'd 416 F. 2d 967 (1969) A-8

Laverne v. Laurel Hollow, 18 N.Y. 2d 635, 272 N.Y.S. 2d 780, 219 N.E. 2d 294 (1966) 7, A-7

Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977) 9, 10

Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S. 2d 574 (1958) Aff'd 7 A.D. 2d 995, 183 N.Y.S. 2d 868, Aff'd 6 N.Y. 2d 892, 190 N.Y.S. 2d 702, 160 N.E. 2d 921 .... A-7

Lyons v. Johnson, 415 F. 2d 540 (1969), cert. denied 397 U.S. 1027, 90 S. Ct. 1273, 25 L. Ed. 2d 538 (1970) A-8

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 ..... 5, 8

People v. Davis, 11 Ill. App. 3d 775, 298 N.E. 2d 350 (1973) 5

PAGE

People ex rel. Mathis v. Brown, 44 Ill. App. 3d 783, 358 N.E. 2d 1160 (1976) A-10, A-11

People v. Schultz, 380 Ill. 539, 44 N.E. 2d 601 (1942) A-10

Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951) 6

Savitch v. Allman, 25 Ill. App. 3d 864, 323 N.E. 2d 435 (1975) A-9

Simpkins v. Simpkins, 219 So. 2d 724 (Fla. 1969) 10

Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) 7, 8, 9, 10, 12

Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964) 7, A-8

United States v. Kordel, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970) 5, 7

Other Authorities

Fifth Amendment to the United States Constitution 3, 5

Fourteenth Amendment, United States Constitution 3

Ill. Rev. Stats., ch. 110, §58 ..... 11, 12

Ill. Rev. Stats., ch. 110, §21(4) A-10

Ill. Rev. Stats., ch. 110, Supreme Court Rules 201-219 ..... 11, 12, A-9, 11

81 Am. Jur. 2d Witnesses, §37 6

In the Supreme Court of the United States

October Term, 1979

No.

JERRY GALANTE and SAM MESSINA, d/b/a BUMP CITY,

Petitioners,

vs.

STEEL CITY NATIONAL BANK OF CHICAGO as Trustee under Trust No. 463, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners pray that a writ of certiorari be issued by this Court to review the judgment and opinion of the Appellate Court of Illinois, First District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported in 66 Ill. App. 3rd, 476 (November 3, 1978) and is re-printed herein as Appendix "A", *post.*

An application to the Appellate Court for a "certificate of importance" to appeal as of right to the Illinois Supreme Court was denied on December 4, 1978. The order denying the application is reproduced herein as Appendix "B".

Plaintiffs' petition for leave to appeal was denied by order of the Supreme Court entered on March 29, 1979, Appendix "C".

JURISDICTION

This petition for a writ of certiorari is filed within ninety (90) days from the final order of the Illinois Supreme Court. Jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the privilege against self incrimination, guaranteed by the Fifth Amendment, as incorporated in the Fourteenth Amendment, extends to a civil action plaintiff who suffered dismissal of his lawsuit because he invoked the privilege and refused to answer questions in the course of his discovery deposition?

(a) Whether plaintiffs, by commencing their action and submitting themselves to the jurisdiction of the State court, can be compelled either to waive their privilege against self incrimination and respond to discovery procedures, or have their complaint dismissed?

(b) Whether the dismissal of plaintiffs' civil complaint placed an unconstitutional burden upon their exercise of the privilege against self-incrimination?

(c) Whether it is repugnant to the Federal constitution to subordinate the privilege against self incrimination to the State's statutory right to discovery in civil cases?

(d) Whether the loss of the right to prosecute a civil action and the potential economic benefit therefrom, is an overly drastic form of sanction and impermissible coercion, condemned by the Court in the context of both criminal and non criminal cases?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ." (Amendment Five to the United States Constitution).

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." (Amendment Fourteen to the United States Constitution).

STATEMENT

Your petitioners filed a civil action to recover damages sustained by them in a fire which destroyed a building insured by some of the respondents. Plaintiffs claimed to be contract purchasers of the property. The insurance companies denied liability and as an affirmative defense charged plaintiffs with arson and an attempt "to cheat and defraud these defendants." Plaintiffs denied the affirmative defense. A counterclaim by the land trustee and the beneficial owner-contract seller was filed for the insurance proceeds, as well as a request for a declaratory judgment to determine the respective rights of the parties to the real estate. Plaintiffs answered the counterclaim and denied their default or delinquency in making monthly payments of the purchase price.

In the course of their discovery depositions, plaintiffs invoked their Fifth Amendment against self incrimination and refused to answer all questions put to them, except their names and addresses. Defendants moved to strike the complaint as sanctions. The trial judge struck and dismissed the complaint with prejudice and defaulted plaintiffs on the counterclaim.

On appeal, the Appellate Court of Illinois, First District, recognized the issue as one of first impression in

Illinois and affirmed the dismissal of the complaint on the grounds that "a plaintiff in a civil action may [not] invoke the Fifth Amendment privilege against self incrimination and still maintain the lawsuit." (66 Ill. App. 3d at p. 481, (App. A., 6). With respect to the counterclaim, however, the Appellate Court ruled that plaintiffs, as counter-defendants, could not be defaulted because of their invocation of the Fifth Amendment and reversed and remanded on that issue. (App. A., 10).

The Appellate Court purports to follow the rule adopted in other jurisdictions, both state and federal, which have resolved the question adversely to the civil plaintiff. Notwithstanding that the Appellate Court agreed that the question presented was "one of first impression in Illinois." (App. A., 6) and that the Court initially was inclined to grant a certificate of importance (App. B), the Illinois Supreme Court refused leave to appeal. (App. C).

Although this Court has spoken of an "unqualified privilege" in certain *non*-criminal cases, the precise questions presented by the instant case have never been squarely ruled upon. The case presents a sensitive constitutional question whether the privilege against self incrimination can be sacrificed and subordinated, in a civil case, to an opponent's statutory right to discovery.

REASONS FOR GRANTING THE WRIT

I.

The constitutional guaranty of the privilege against self-incrimination is absolute and unqualified where timely claimed and the danger of subsequent criminal prosecution is shown.

The Fifth Amendment in pertinent part provides:

> "No *person* . . . shall be compelled in any *criminal* case to be a witness against himself . . ." (Emphasis added).

The guarantee of the Fifth Amendment is embraced in the Fourteenth Amendment. *Malloy* v. *Hogan,* (1964) 378 U.S. 1.

A. The privilege extends to witnesses and parties in civil litigation.

Although nominally the privilege against self-incrimination is specified in criminal cases, the privilege is not limited to criminal proceedings, but has been held to extend to witnesses and parties in civil proceedings where the danger of subsequent criminal prosecution is shown. *Malloy* v. *Hogan,* supra; *People* v. *Davis,* 11 Ill. App. 3d 775. The scope of the protection is not limited to trial testimony, but applies also to discovery depositions and interrogatories. *United States* v. *Kordel,* (1970) 397 U.S. 1.

Two notable differences exist in criminal and civil cases with respect to the privilege: while a defendant in a criminal case may not be compelled to take the stand at all, a party to a civil action may be called as an adverse witness and he must affirmatively claim the Fifth Amendment privi-

lege to be excused from testimony. *Brown* v. *United States* (1958), 356 U.S. 148. A second material difference is that no adverse inferences may be drawn from the assertion of the privilege in a criminal case. *Griffin* v. *California* (1965), 380 U.S. 609. But the failure of the civil litigant to testify may draw free comment from the opponent and adverse inferences by the trier of fact. *Bilokumsky* v. *Tod* (1923), 263 U.S. 149. Since only the claimant knows when an apparent innocent disclosure may incriminate him, he must assert the privilege at the earliest opportunity or risk waiver of the privilege. *Rogers* v. *United States* (1951), 340 U.S. 367.

In the case at bar, the Illinois courts penalized the plaintiffs for claiming the privilege and dismissed their lawsuit. The authorities cited by the Appellate Court in its rationale for that harsh result conflict with Fifth Amendment doctrine uttered by this Court. The result reached in the instant case visits an unwarranted and impermissible penalty upon the plaintiffs for asserting their constitutional privilege.

B. The right to remain silent may not be infringed by imposing a penalty for the silence.

Dismissal of the lawsuit and depriving plaintiffs of their right to prosecute their cause of action is a form of coercion condemned by this Court.

In 81 Am. Jur. 2d WITNESSES, §37, at p. 65, there appears a statement of the so-called majority and minority rule:

> "It has generally been held or recognized in civil cases, *although there is authority to the contrary,* that a motion to dismiss a complaint, if timely made in the trial court should be sustained where plaintiff exercised his privilege against self incrimination to refuse to answer questions pertinent to the issues involved. The rationale upon which these decisions have been based

> is that although the privilege against self incrimination is available to either party in a civil action, the plaintiff who invokes this privilege should not be permitted to prevail and, in effect, 'eat his cake and have it too.' " (Emphasis added).

Citing 4 ALR 3d 548, 544-548, §2(b); *Bishop* v. *Bishop,* 121 SE 305 (Ga.); *Stockham* v. *Stockham,* 168 So. 2d 320 (Fla); *Bauer* v. *Stearn Finance Co.,* 169 N.W. 2d 850 (Ia); *Christensen* v. *Christensen,* 162 N.W. 2d 194 (Minn); *Franklin* v. *Franklin,* 283 SW 2d 483 (Mo); *Laverne* v. *Laurel Hollow,* 219 N.E. 2d 296 (N.Y.); *Henson* v. *Citizens Bank of Irving,* 549 SW 2d 446 (Tex). (Trial court held to have abused its discretion without first directing plaintiff to answer allegedly incriminating questions.)

While the foregoing cases may stand for the proposition cited, an analysis of their precedential roots indicates that the alleged "majority" rule has carried the case law well beyond the limited rulings and special circumstances in the original cases which announce the rule. Later cases cited by the Appellate Court in the instant case are grotesque permutations of the progenitor civil case, *Bishop* v. *Bishop* (1924), supra.

Significantly, none of the cases cited include a decision of this Court, and the cited authorities do not square with the pronouncements of this Court on the general subject of Fifth Amendment protections in non-criminal cases. The fact that the case is civil rather than criminal in character does not preclude assertion of the privilege. *Gardner* v. *Broderick,* 392 U.S. 273, 276; *United States* v. *Kordel,* 397 U.S. 1, 8.

In *Spevack* v. *Klein* (1967), 385 U.S. 511, a lawyer was disbarred for invoking the Fifth Amendment and refusing to produce documents or testify at his disciplinary proceed-

ing. Reversing the New York state court, and overruling and its prior holding in *Cohen* v. *Hurley* (1961) 366 U.S. 117, this court held that, pursuant to *Malloy* v. *Hogan,* supra, the Fifth Amendment protection applied in a non-criminal case and warned against all attempts to circumvent the absolute guarantee of the privilege against self-incrimination. The Court said (at pp. 514-515):

> "We said in *Malloy* v. *Hogan*:
>
> > 'The Fourteenth Amendment secures against State invasion of the same privileges that the Fifth Amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty* . . . for such silence.' 378 U.S. at 8, 84 S. Ct. at 1493, 12 L. ed. 2d at 659.
>
> "In this context 'penalty' *is not restricted to fine or imprisonment.* It means, as we said in *Griffin* v. *California,* 380 U.S. 609 . . . *the imposition of any sanction* which makes the assertion of the Fifth Amendment privilege 'costly' . . ." (Emphasis added).

The foregoing would include an *economic* sanction—deprival of the benefit which a party may secure from the prosecution of a civil complaint.

In *Garrity* v. *New Jersey* (1967), 385 U.S. 493, this Court struck down a New Jersey statute which required a police officer to waive his privilege against self-incrimination and to testify at an investigatory hearing or suffer automatic removal from office. Citing the broad penalty principle previously enunciated in *Spevack,* the Court said (at p. 497):

> "The choice given petitioners was either forfeit their jobs or incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.
>
> * * *
>
> Where the choice is 'between the rock and the whirlpool' duress is inherent in deciding to 'waive' one or the other. 'It always is for the interests of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest *does not exclude duress.* It is a characteristic of duress, so-called.' " (p. 498).

Continuing, this Court in *Garrity* said at p. 500:

> "There are rights of constitutional stature whose exercise a State *may not condition by the extraction of a price.* . . .
>
> * * *
>
> Were it otherwise . . . it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it and then to declare the acceptance *voluntary.*" (p. 498) (Emphasis added).

In *Lefkowitz* v. *Cunningham* (1977), 431 U.S. 801, the Court applied the rule in *Spevack* and *Garrity* in reviewing a New York statute which required public officials to waive their Fifth Amendment privilege in grand jury proceedings or be divested of their office and prohibited from holding any public office for a period of five years. Addressing the question of coercion by withholding of "potential economic benefits" the court said (p. 805):

> "But the touchstone of the Fifth Amendment is compulsion and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the amendment forbids."

In the case at bar, the effect of the Illinois circuit court's dismissal of plaintiffs' complaint was to deprive them of their claim for hundreds of thousands of dollars arising

from their alleged rights in the property and their contractual rights with insurance companies. In effect, the circuit court and the appellate court have held that a loss of the right to prosecute a civil cause of action is a permissible form of coercion—contrary to *Spevack, Garrity* and *Lefkowitz,* supra.*

C. A distinction between a plaintiff and defendant in a civil action as to whether or not the Fifth Amendment may be invoked without penalty is artificial and not supported by this Court's decisions.

The distinction made by the Appellate Court in the case at bar as to whether *plaintiff* or *defendant invokes* the Fifth Amendment is predicated on the concept of *voluntariness*: The Court assumes that a plaintiff bringing the action has a choice of answering discovery questions or being non-suited, whereas a defendant has no such choice. Although having a surface appeal, the distinction cannot withstand constitutional analysis for the following reasons:

(1) The homily that one cannot "eat his cake and have it too"is not apt. The language quoted from *Spevack* and *Garrity*, supra, would indicate that one cannot be compelled to trade off a valuable constitutional privilege as the price of pursuing a cause of action.

(2) The court has unequivocally repudiated a classification of types of persons who may claim self-incrimination. As the Court said in *Spevack* at p. 516:

* In *Simpkins* v. *Simpkins*, 219 So. 2d 724 (Fla. 1969), the Florida court held (p. 726-727):

"On the authority of these decisions the United States Supreme Court, we hold it was error in the instant case for the Court to require the defendant husband to answer the questions [in a divorce case] on his discovery deposition . . . under penalty of dismissal of his suit if he should insist on his constitutional privilege against self-incrimination."

"We find no room in the privilege against self-incrimination for classification of people *so as to deny it to some and extend it to others.* Lawyers [substitute litigants] are not excepted from the words 'no person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception." (Emphasis added).

(3) In the context of discovery proceedings, neither the Illinois Civil Practice Act (Ill. Rev. Stats. 1977, ch. 110, §58) nor the rules of the Illinois Supreme Court (Ill. Rev. Stats. ch. 110, §§201-219 classify or discriminate between plaintiffs and defendants in their assertion of the right of discovery. By the same token, no such distinction should be made with respect to who may claim the privilege against self-incrimination at the risk of being non-suited or defaulted.

(4) There are circumstances under which a witness may be "voluntary" and therefore can waive the privilege of self-incrimination—as when the defendant on his own behalf takes the stand. See *Brown* v. *United States* (1958), 356 U.S. 140, a naturalization proceeding where the defendant took the stand on her own behalf and was held to have abandoned her constitutional privilege. This Court likened her "voluntary" action to that of a defendant taking the stand in a criminal case. The rationale of *Brown* is not appropriate to a plaintiff in a civil case who is *not* a "voluntary witness" *when called to testify by the adversary.* A witness who has to give legally compelled testimony is an "involuntary witness". *Arndstein* v. *McCarthy* (1923), 254 U.S. 71. In the case at bar the testimony of Galante and Messina was legally *compellable* even though they were plaintiffs. Hence they were *involun-*

tary, not voluntary, witnesses and the applicable rule should be found in *Arndstein,* not *Brown.*

(5) The Illinois courts in the instant case have confused the distinction between an involuntary *witness* and a voluntary *litigant.* To be sure, plaintiffs are *voluntary* litigants. But they are *involuntary* witnesses with respect to defendants' discovery questions. The mere filing of non-incriminating pleadings (the complaint) does not operate to waive or abandon the Fifth Amendment privilege. *Arndstein,* supra. Further, the test of *voluntariness* does not arise at the time of filing a non-incriminating complaint, but may arise when that party is called to give testimony involuntarily by the adversary. The filing of a non-incriminating complaint does not and should not constitute a waiver of a subsequently claimed privilege under the Fifth Amendment.

(6) The Court's decisions in *Spevack, Garrity, Brown* and *Arndstein* do not suggest that a plaintiff stands in a different posture than a defendant with respect to the protection of the Fifth Amendment.

II.

The constitutional privilege against self-incrimination is paramount to the State's statutory right to discovery.

The decision of the Illinois Appellate Court has the effect of subordinating petitioners' constitutional privileges under the Fifth Amendment to the defendants' right to discovery under the pertinent provisions of the Illinois Civil Practice and Rules of the Illinois Supreme Court. Such juxtaposition of priorities is untenable and intolerable. Axiomatically, defendants' statutory right to discovery must yield to plaintiffs' constitutional privilege against self-incrimination unless the privilege is waived.

III.

The successful invocation of plaintiffs' right to remain silent is more of a detriment to their case than to defendants' defense, but this is a risk that plaintiffs should be permitted to make freely without suffering sanctions of the dismissal of their lawsuit.

As above noted, where a litigant in a civil action asserts the Fifth Amendment, the adversary is free to comment on the party's refusal to testify and the trier of fact may readily draw inferences adverse to plaintiff. While to a certain extent defendants may be prejudiced by plaintiffs' refusal to testify, a far more serious detriment accrues to plaintiffs who successfully invoke the privilege. In the circumstances, on a balancing of the respective detriments, a plaintiff in a civil action should be free to make the choice: to testify or not to testify, without suffering the consequences of outright dismissal of his lawsuit.

Where a plaintiff chooses to invoke the Fifth Amendment in the course of discovery testimony, he thereby precludes his *own* testimony on the trial of the cause. That preclusion, however, should not extend to depriving plaintiff of the right to prove his case by independent testimony and the evidence of other witnesses. The outright dismissal of petitioners' lawsuit merely because they precluded themselves from proving their case by their own testimony is an overly-harsh sanction incompatible with due process.

CONCLUSION

Although there purports to be a "majority" and "minority" view as to whether plaintiff in a civil action could either waive his privilege against self incrimination or lose his right to prosecute his suit, the cases are not numerous and this Court has never squarely decided the issue. The

result below, however, is contrary to this court's unqualified application of the privilege in various non-criminal cases. Considerations of constitutional doctrine, logic and consistency, require extension of that doctrine to the instant case. Wherefore, petitioners pray that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH R. CURCIO
Attorney for Petitioners

Of Counsel:
SIDNEY Z. KARASIK

APPENDICES FOLLOW

APPENDIX

APPENDIX A

OPINION OF THE APPELLATE COURT
(Reported in 66 Ill. App. 3d 476, Nov. 3, 1978)

Mr. JUSTICE LORENZ delivered the opinion of the court:

Plaintiffs appeal from an order dismissing their complaint and entering a default judgment against them on defendants' counterclaim. On appeal they contend that the trial court erred in refusing to recognize their right to assert the Fifth Amendment privilege against self-incrimination during their pre-trial depositions.

The following facts pertinent to this appeal appear in the record.

Plaintiffs brought this action to recover insurance proceeds after certain property in which they claimed an interest was destroyed by fire. In their complaint they alleged that they were contract purchasers of a certain tract of land, including the buildings and structures thereon, located at 8305 West North Avenue, Melrose Park, Illinois. They also owned or were contract purchasers of certain personal property located on the premises. Defendant Steel City National Bank of Chicago (Steel City) was the trustee of the real property and held legal title thereto while Bernard Grizaffi held the sole beneficial interest in the property. The remaining defendants were various insurance companies which had issued insurance policies in name of Steel City and the plaintiffs. These various insurance policies covered the said premises, including the buildings, improvements, furnishings and personal property for losses resulting from "fire, lightning, or other calamitous events."

The complaint further alleged that on April 30, 1975, a fire "of unknown origin" destroyed the buildings and contents located on the premises. Plaintiffs claimed both a legal and an equitable interest in and to the proceeds from the aforementioned insurance policies. Although plaintiffs claimed to have performed the necessary conditions precedent to recovery under the policies, the insurance companies refused to acknowledge their interest in the proceeds. Furthermore, defendants Steel City and Bernard Grizaffi also claimed that plaintiffs had no interest in the proceeds. In their prayer for relief plaintiffs sought recovery under the policies from each of the defendants insurance companies.

Defendant insurance companies answered the complaint, denying any liability to the plaintiffs. In addition, defendants National Ben Franklin Insurance Company and Reserve Insurance Company in their answer also raised the affirmative defense of arson, alleging in pertinent part that:

> "[T]his lawsuit is an attempt on the part of Plaintiffs to cheat and defraud these Defendants since * * * the Plaintiffs or their duly authorized agents, servants or employees, did set fire to or cause to be set fire to, burned or caused to be burned, the property described * * *."

Plaintiffs filed a reply denying the affirmative defense. Defendants Steel City and Grizaffi brought a counterclaim against the plaintiffs and the insurance companies. In their counterclaim they alleged that on August 16, 1974, Steel City had entered into Articles of Agreement for Trustee's Deed with the plaintiffs. Plaintiffs agreed to purchase the real estate described in the complaint for a total purchase price of $200,000 with $40,000 down payment and the bal-

ance payable in monthly installments of $1,720 plus interest at the rate of 10% per annum on the unpaid balance. They also agreed to pay the annual taxes on the real estate and the monthly insurance premiums. Steel City and Grizaffi alleged that commencing October 1, 1974, plaintiffs failed to make the monthly payments as agreed. As a result of this default in payments, Steel City and Grizaffi claimed that plaintiffs owed them a total of $203,099.45, including the unpaid balance of the purchase price, interest, real estate taxes, insurance premiums, attorney's fees and late charges. In their counterclaim they sought an order compelling defendant insurance companies to pay the insurance proceeds from the fire loss to Steel City and a declaratory judgment as to the rights of the parties in and to the real estate described in the complaint.

Plaintiffs answered the counterclaim, denying that they had failed to make all of the monthly contract payments to Steel City and that they had failed to pay the insurance premiums and real estate taxes. In their answer to the counterclaim plaintiffs also requested that the court dismiss the counterclaim.

Subsequently, on July 14, 1976, plaintiffs appeared for their discovery depositions pursuant to notice by the defendants. The deposition of Galante proceeded first. After being duly sworn under oath and stating his name, Galante invoked the Fifth Amendment privilege against self-incrimination to each of numerous questions propounded by the respective defendants.* To each such question Galante replied, "I decline to answer that question on the grounds that any answer I give may tend to incriminate me."

---

* A transcription of the examination of Galante, prepared by a Certified Shorthand Reporter who was present at the depositions, consists of approximately 50 pages.

Plaintiff Messina, after being duly sworn under oath, was next deposed and also refused to give any answers other than his name. After he refused to give his address and state whether he had heard the questions asked of Galante, his attorney stipulated that Messina was present during the Galante deposition and would invoke the Fifth Amendment privilege against self-incrimination if asked the same or similar questions as were propounded to Galante.

Thereafter, on August 13, 1976, defendants presented motions to dismiss plaintiffs' complaint or for other sanctions pursuant to Illinois Supreme Court Rule 219 (Ill. Rev. Stat. 1975, ch. 110, par. 219) as a result of plaintiffs' refusal to answer questions at their depositions. On March 10, 1977, the trial court, after reviewing the briefs submitted by the interested parties and hearing arguments of counsel, ordered in pertinent part that:

> "[A]ll matters pending be and hereby are continued for further hearing to Tuesday, April 4, 1977, at 3:00 P.M., at which time plaintiffs or their counsel will indicate whether plaintiffs, separately or together, will respond to proper questions at a deposition * * *.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should and in the event plaintiffs, separately or together, indicate an intention not to answer questions propounded, then and in that event the Court will on April 4, 1977, strike and dismiss the cause of action of plaintiffs, Galante and Messina, and to enter default judgment against plaintiffs in their capacity as counter-defendants."

At the hearing on April 4, 1977, the trial court asked their counsel whether the plaintiffs were "prepared to answer proper questions at a deposition, proper being referred to as relevant and material to this case." Plaintiff's counsel replied that "my clients persist in their Fifth Amendment privilege" and that "in the absence of prosecutory immunity they are not prepared to waive their presence." The following exchange next occurred at the hearing:

> "PLAINTIFFS' COUNSEL: Your Honor, so that I may understand your question, appear and answer proper questions. I don't know what these proper questions are.
>
> THE COURT: Questions that are relevant or material to the issues in the case.
>
> They do not have to answer questions about the prospect of the Chicago Cubs this year.
>
> We understand what proper questions at a deposition are. We discuss that all the time as lawyers.
>
> PLAINTIFFS' COUNSEL: Your Honor, again I repeat what I have said. My clients are not prepared to waive their Fifth Amendment rights and privileges.
>
> They feel there is a real threat of criminal prosecution.
>
> They cannot appear before this Court and answer these questions, nor can they appear at a discovery deposition and voluntarily participate in that where there is a threat of criminal prosecution.
>
> THE COURT: The Court finds that their refusal to answer the questions that comprised more than 50, 60 pages in the case of Galante at his deposition is without any * * * authority * * *. The Court finds that they have not so answered.

> We then go onto the next step. We will at this time strike and dismiss the cause of action and enter default judgment against the Plaintiffs in their capacity as counterdefendants."

Following this hearing the trial court issued a finding that the plaintiffs would continue in their refusal to answer "proper oral interrogatories propounded to them at a deposition." The trial court therefore on April 5, 1977, struck all pleadings filed by the plaintiffs, dismissed their complaint with prejudice and entered a default judgment against them on the counterclaim of Steel City and Bernard Grizaffi.

Plaintiffs appeal from the entry of this order.

OPINION

Plaintiffs first contend that the trial court erred in dismissing their complaint after they refused to answer questions at their depositions. They argue that the dismissal placed an unconstitutional burden upon their exercise of the Fifth Amendment privilege against self-incrimination.

The question of whether the plaintiffs, by commencing the action and submitting themselves to the jurisdiction of the court can be compelled either to waive their privilege against self-incrimination found in the Fifth Amendment of the United States Constitution and respond to discovery procedures, or have their complaint dismissed, is one of the first impression in Illinois. Our research does indicate, however, that a number of other jurisdictions, both state and federal, have dealt with this precise question. These jurisdictions have overwhelmingly rejected the contention that a plaintiff in a civil action may invoke the Fifth Amendment privilege against self-incrimination while still maintaining the lawsuit.

In *Levine* v. *Bornstein* (1958), 13 Misc. 2d 161, 174 N.Y.S. 2d 574, *aff'd* (1959), 7 A.D.2d 995, 183 N.Y.S.2d 868, *aff'd*, 6 N.Y.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921, the defendant alleged that the plaintiff, an attorney, had solicited the action to collect a judgment. The plaintiff attempted to invoke the Fifth Amendment privilege in response to the allegation during examination prior to trial and cited decisions where such privilege had been properly asserted. The court rejected plaintiff's contention stating:

> "However, an examination of the above and other reported cases on the subject reveals that the privilege was always claimed by a non-party witness or by a defendant in court involuntarily, seeking only to defend. It does not follow that the protection of the privilege should be expanded to shield a plaintiff who with one hand seeks affirmative relief in court and with the other refuses to answer otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action. To uphold this inconsistent position would enable the plaintiff to use the privilege as an instrument of attack." 13 Misc. 2d at 164, 174 N.Y.S.2d at 577.

The *Levine* case was cited with approval in *Laverne* v. *Incorporated Village of Laurel Hollow* (1966), 18 N.Y. 2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294, where the Court of Appeals of New York stated:

> "The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt by defendant at a pre-trial discovery proceeding to obtain information relevant to the cause of action alleged and possible defenses thereto." 18 N.Y. 2d at 638, 272 N.Y.S. at 782, 219 N.E.2d at 295.

Other sister states have also adopted the rule that a plaintiff may not maintain a civil action while simultaneously invoking the Fifth Amendment in refusing to comply with requests for discovery. See *Christenson* v *Christenson* (1968), 281 Minn. 507, 162 N.W.2d 194; *Franklin* v. *Franklin* (1955), 365 Mo. 442, 283 S.W.2d 483; *Annest* v. *Annest* (1956), 49 Wash. 2d 62, 298 P.2d 483; *Stockham* v. *Stockham* (1964), 168 So.2d 320.

The federal courts which have considered this issue have also rejected a plaintiff's right to maintain a civil action while also asserting the Fifth Amendment privilege in response to a defendant's requests for discovery. (See *Lyons* v. *Johnson* (1969), 415 F.2d 540, *cert. denied* (1970), 397 U.S. 1027, 90 S.Ct. 1273, 25 L.Ed.2d 538; *Brown* v. *Ames* (1972), 346 F. Supp. 1176; *Kisting* v. *Westchester Fire Ins. Co.* (1968), 290 F. Supp. 141, *aff'd* (1969), 416 F.2d 967; *Independent Products Corp.* v. *Lowe's Inc.* (1958), 22 F.R.D. 266.) *Kisting*, which presented a situation similar to the case at bar, involved a civil action on a fire insurance policy wherein the insurer alleged arson by the insured as an affirmative defense. The plaintiff there, asserting the Fifth Amendment privilege, refused to answer certain questions propounded to him by defendant's counsel at a pre-trial examination. The court, in answer to plaintiff's assertion of the privilege stated:

> "Plaintiffs * * * seek to utilize the privilege not only as shield, but also as a sword. This they cannot do. A plaintiff in a civil action who exercises his privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion. (Citations omitted)." 290 F. Supp. at 149.

We find the reasoning of the above cases to be persuasive and are in agreement with the opinions expressed therein. Although it is true that plaintiffs cannot be forced to involuntarily incriminate themselves, we do not believe they should be permitted to use the Fifth Amendment privilege as both a shield of protection and a sword of action and, at the same time, refuse to answer questions, It would be unjust to allow them to prosecute their cause of action, and at the same time, refuse to answer questions, the answers to which may substantially aid defendants or even establish a complete defense. See *Independent Productions Corp.* v. *Loew's, Inc.* (1958), 22 F.R.D. 266.

Plaintiffs argue, however, that the trial court abused its discretion in not first ordering them to answer questions before dismissing the complaint. Supreme Court Rule 219 (Ill. Rev. Stat. 1975, ch. 110A, par. 219) does not, however, require such a prerequisite. (*Savitch* v. *Allman* (1975), 25 Ill. App. 3d 864, 323 N.E.2d 435.) While it is true that "[t]he dismissal of a cause with prejudice is a drastic sanction and should be employed only as a last resort," (*Department of Transportation* v. *Zabel* (1975), 29 Ill. App. 3d 407, 410, 330 N.E.2d 878, 880), we believe such action was warranted here. At the hearing on the motion to dismiss, plaintiffs' attorney repeatedly stated that, in the absence of prosecutory immunity, plaintiffs would continue to invoke the Fifth Amendment privilege at their depositions. We believe the record indicates that an order compelling plaintiffs to abandon their Fifth Amendment claim would have been a futile gesture. Accordingly, we cannot say that the trial court abused its discretion in dismissing the complaint.

Plaintiffs also contend that the trial court erred in ordering a default judgment against them on the counter-

claim for their invocation of the privilege against self-incrimination at their depositions. We believe plaintiffs' assertion of the privilege as counter-defendants must be distinguished from their assertion as plaintiffs. As counter-defendants, the plaintiffs stood as involuntary defendants rather than as voluntary, active litigants. (See Ill. Rev. Stat. 1975, ch. 110, par. 21(4).) The procedure to be followed where a defendant in a civil action asserts the Fifth Amendment privilege against self-incrimination during a deposition was articulated by this court in *People ex* rel. *Mathis* v. *Brown* (1976), 44 Ill. App. 3d 783, 358 N.E. 2d 1160. That case involved the right of a defendant in a paternity action, a civil proceeding, to refuse to answer deposition questions based upon the privilege against self-incrimination. The trial court allowed the defendant to invoke the privilege and refused to order him to answer any deposition questions. On appeal, we recognized the existence of defendant's privilege but held that the trial court erred in its method of recognizing the privilege, stating:

> "[T]he mere assertion of constitutional privilege does not automatically insulate a party from the usual duty to comply with discovery. The deponent must have a reasonable ground to fear self-incrimination if he is compelled to answer (*People* v. *Schultz* (1942), 380 Ill. 539, 544, 44 N.E.2d 601); fanciful or imaginary dangers will not suffice. (*In re Holland* (1941), 377 Ill. 346, 355, 36 N.E.2d 543.) In the case at bar, therefore, the trial court should have scrutinized each disputed question and clearly ruled on the reasonableness of defendant's refusal to answer." (44 Ill. App. 3d at 787, 358 N.E.2d at 1163.)

As counter-defendants, the plaintiff here clearly retained their Fifth Amendment privilege against self-incrimination at the depositions. The trial court, however,

did not conduct a review of each question in order to determine whether the answer could possibly have tended to incriminate plaintiffs. We believe plaintiffs, in their capacity as counter-defendants, were entitled to such a question by question determination in order to adequately protect their rights under the Fifth Amendment. Had they persisted in refusing to answer questions to which the Fifth Amendment was found inapplicable, the trial court could have properly ordered a default judgment against them in the counterclaim pursuant to Ill. Rev. Stat. 1975, ch. 110A, par. 219(c)(v). (See *People ex rel. Mathis* v. *Brown* (1976), 44 Ill. App. 2d 783, 358 N.E.2d 1160.) Accordingly, the counterclaim must be remanded to the trial court for a proper determination as to the applicability of the Fifth Amendment privilege against self-incrimination to each deposition question asked of plaintiffs.

For the foregoing reasons the portion of the judgment of the circuit court dismissing the complaint is affirmed. The portion of the judgment ordering a default against plaintiffs on the counterclaim is reversed and remanded for further proceedings not inconsistent with the opinions expressed herein.

Affirmed in part;

Reversed in part;

Remanded with directions.

SULLIVAN, P.J. and WILSON, J., concur.

APPENDIX B

ORDER

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

Jerry Galante and Sam Messina, d/b/a Bump City,

Plaintiffs/Counter-Defendants-Appellants,

v. NO. 77-833

Steel City National Bank of Chicago, as Trustee under Trust No. 1463, et al.,

Defendants/Counter-Plaintiffs-Appellees.

ORDER

IT IS HEREBY ORDER THAT Appellants Application for Certificate of Importance be ~~allowed~~ DENIED.

12/4/78

Name Sidney Karasik
Attorney for Defendants-Appellants
Address 134 South LaSalle Street
City Chicago, Illinois 60603
Telephone

Justice
Justice
Justice

GILBERT S. MARCHMAN, CLERK OF THE APPELLATE COURT, FIRST DISTRICT

APPENDIX C

ILLINOIS SUPREME COURT

CLELL L. WOODS; CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

March 29, 1979

Mr. Sidney Z. Karasik
Attorney at Law
134 South LaSalle St.
Chicago, Il 60603

No. 51517 — Jerry Galante, et al., etc., petitioners, vs. Steel City National Bank of Chicago, as Trustee, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court